IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5639 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? Yes.

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3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

NADIAD MUNICIPALITY

Versus

GHANSHYAM R BAROT AND OTHERS.

Appearance:

MR HJ NANAVATI for Petitioner

MR DJ BHATT for Respondent No. 1

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 05/08/98

ORAL JUDGEMENT

Rule. Mr. P.M. Thakkar, Senior Counsel for the respondents waives service of rule.

2. The petitioner-Nadiad Municipality has filed the present petition to challenge the order passed by the Industrial Tribunal, Ahmedabad, on 21.5.98 in Complaint No.137/94.

3. The respondents no.1 to 32 are the employees of the present petitioner. Out of these respondents, except respondent Pramodbhai M. Dave, Bhaskar R.Barot, Naimash V. Desai, Mustufa R. Shabhai are appointed in the year 1995 by passing a resolution by the petitioner-municipality. The Municipality had also passed another resolution by same time, by which, about 54 employees working with the Municipality were given promotion. The Collector of Kheda was pleased to declare both these resolutions as invalid and illegal and cancelled the said resolutions. The action of the Collector in cancelling the said resolution was challenged by the present respondents by preferring a Revision/Appeal before the Secretary of Urban Development, whereas, the other group of 54 persons had challenged the said action of Collector by preferring a petition in this court. One of the contention raised in the said petition was that the Collector has no power to cancel the resolution which is already enforced and brought in the practice. Therefore, a Reference was made to the Full Bench of this court to consider and decide the issue as to whether a Collector by exercising its power under section 258 of the Gujarat Municipalities Act, can cancel the resolution passed by the Municipality which has been enforced and implemented. The Full Bench has answered the said reference by holding that it is competent for the Collector to cancel the resolution even though the same is enforced and implemented.

4. Though the present Municipality was initially contending that the Collector has no authority to cancel a resolution passed by the Municipal Board or Municipality by contending that a Collector had no jurisdiction to do so, but, when the action of the Collector was found to be upheld by the court, the Municipality wants to act on the action taken by the Collector.

5. It is also necessary to mention here that the present respondents had initially filed Civil Suit before the Civil Court in order to obtain an injunction order to restrain the Municipality from implementing the action of the Collector and to restrain them from dismissing them

from service. But they failed to get favourable order from the Civil Court and hence, they withdraw the said Civil Suit. Thereafter, they had also filed a petition in this court. In the said petition, the Municipality had taken a stand that if the Full Bench of this Court upholds the contention of the Municipality as well as respondent that the Collector had no authority to cancel the resolution which is enforced and implemented then they will not take the action against the respondents and that they will abide by the decision of the Full Bench. In view of the said statement, the respondents had withdrawn the petition filed in this court.

6. But after the decision of the Full Bench of this court, the respondents have gone before the Labour Court. As a matter of fact, the respondents have not gone before the Labour Court in individual capacity, but, an application is filed by Akhil Gujarat Mazdoor Sangh on behalf of the respondents under section 33 A of Industrial Disputes Act, by filing a Complaint No.1/1998 in Reference No.137/1994. In the said application, they had contended that by taking action against the respondents in view of the decision of the Collector of cancelling the said resolution by which they were appointed, the Municipality is going to make an alteration in their service condition, and therefore, the said action of the Municipality should be declared as illegal and invalid. They also gave a separate application seeking interim injunction against the present petitioner to restrain the petitioner from not taking any action till final disposal of the complaint filed by them. The Industrial Tribunal of Nadiad was pleased to pass an ex-parte order by which the petitioner is restrained from taking any action by which there is likelihood of alteration in the service condition of the respondents by its order dtd.21.5.98 that order is a subject matter of the present petition.

7. It is contended on behalf of the petitioner that the said order is obtained by the respondents by playing fraud on the Industrial Tribunal, they have not disclose that they had already gone before the Civil Court and had failed to obtain an order of injunction which they were seeking before the Industrial Tribunal. It is also contended that the respondents are not parties to the original Reference. Consequently, they are not entitled to file an application under section 33 A of the Industrial Disputes Act. It is further contended that the application under section 33 A could be filed only by the workmen who is affected, and application by the Union on behalf of the workmen is not tenable in law. It is

further contended that the Labour Court had no jurisdiction to entertain the Complaint application as well as to grant interim relief sought for.

8. As against this, it is contended on behalf of the respondents that though they may not be parties to the original reference as they are bound by the decision of that reference, they will be the workmen as contemplated by section 33 A of the Industrial Disputes Act. It is further contended that the Industrial Tribunal had jurisdiction to entertain the application as well as to grant interim relief as sought for. The Municipality must go before the Industrial Tribunal and seek the vacation of the interim order. The Industrial Tribunal could decide the question of facts involved in the complaint and it will be not proper for this court to entertain this petition by exercising its power under Article 226 and 227 of the Constitution of India. It is further contended on behalf of the respondents that the other petition, Petition No.10751/96 is pending and in the said petition, already an interim relief is granted to protect the employees of the municipality and in spite of the decision of the Full Bench, the Court has refused to vacate the said interim relief granted in favour of those employees and that petition is to come up for final hearing in September 1998. Therefore, the Municipality is not justified in treating the present respondents differently than those employees who are covered in the said writ petition.

9. At the outset, it must be said that the issue involved in Special Civil Application No.10751/96 and the issue which is involved in the case of the present respondents is quite different. The present respondents except the four respondents mentioned above were appointed by a Municipal Resolution. The Collector has found with the said contention was not according to the rules and regulations and the said resolution of the municipality was illegal and invalid, and therefore, he has cancelled the same. As regard the other employees involved in other petition, those employees were only given promotion and there is no fresh appointment of them. No doubt the Collector has held that the resolution passed by the Municipality giving those employees promotion is illegal and invalid. But the Learned Single Judge while considering the question of vacating the interim relief in view of the decision of the Full Bench of this Court has observed that merely on holding that the Collector had jurisdiction to cancel the resolution which is already enforced and implemented, it is not possible to hold that the said resolution passed

by the Municipality is illegal and invalid, in view of provisions of section 258 of the Gujarat Municipalities Act, and that it deserves to be considered after fully hearing of the parties regarding the validity and legality of the said resolution. It must be remembered what has been held by the Full Bench of this court is that the Collector had jurisdiction to cancel the resolution passed by the Municipality even inspite of the fact that the resolution is enforced and implemented. The Full Bench has not decided the validity and legality of the action taken by the Collector in cancelling these two resolutions. The Full Bench has only considered the jurisdiction of the power of the Collector and the validity and legality of the order of the Collector that question will have to be considered and decided when the same is raised by any party, which is going to be affected by action of the Collector, before the Court or the authority as the case may be.

10. The respondents have initiated the application under section 33 A before the Labour Union. For the purpose of this petition, it is not necessary for me to go into the question as to whether the application filed by the Labour Union on behalf of the employees is tenable or not, because, in my opinion, in view of the facts and circumstances of the case, it is not necessary at all to consider and decide that question. Admittedly, the respondents have filed an application under section 33 A of the Industrial Disputes Act, 1947. Before considering the provisions of the said section 33 A it is also necessary to mention that section 33 of Industrial Disputes Act prevents the employer from changing the condition of service of the employees during the pendency of the proceedings before the Labour Court/Industrial Tribunal. The said section also further provides that before actually taking any change in condition in service, the approval is to be sought. The section 33 A runs as under:

"Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceedings:-

"Where an employer contravenes the provisions of Section 33 during the pendency of proceedings (before a conciliation officer, Board, an arbitrator, a Labour Court, Tribunal or National Tribunal), any employee aggrieved by such contravention,may make a complaint in writing, (in prescribed manner, -

(a) to such conciliation officer or Board, and the conciliation officer or Board shall take such complaint into account in mediating in, and promoting the settlement of, such industrial dispute; and

(b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicated upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly.

The heading of the section says that it is a special provision for adjudication as to whether conditions of service are changed during the proceedings. The word used is "changed". Therefore, that word "changed" shows and indicates that a complaint under section 33 A would arise only after a change in service condition has been effected. The first sentence of the section says that when an employee contravenes the provisions of section 33, when the word "contravenes" is used it indicates that there must be an actual contravention by the employer. Therefore, if the section 33 A is carefully read, it will be quite clear that no complaint could be lodged under section 33 A for the actual completed action of the employer. The section 33 A will come into play only after the employer had changed the condition of the service and contravened the provisions of section 33. Therefore when it is not the case of the workman when he approach before the Industrial Tribunal or the Labour Court under section 33 A that there was already changed or contravention by the employer, then the Labour Court/Industrial Tribunal has no jurisdiction to entertain an application under section 33 A. The section 33 A is not in the preventive nature. If a workmen feels that there is a likelihood of change in his service condition and if he wants to have ad-interim relief, then he will have to approach before the Industrial Tribunal/Labour Court, as the case may be, before whom the Reference is pending or in case of the Conciliation proceedings before the authority before whom the Conciliation Proceedings are pending. It must also be further mentioned here that if the employer happened to commit the breach of section 33 then not only civil action could be taken against the employer but even a criminal action could be taken against the employer. But

I am unable to accept the contention of the respondents that before actual breach of condition of the service, the workmen could file an application under section 33 A.

11. It is contention of Mr. Nanavati, learned advocate for the petitioner, the present respondents are not party except the four respondents their names mentioned above are not party pending Reference, and therefore, there would not be covered by section 33, but section 33 is interpreted by the Apex Court in the case of M/s. New India Motors (P) Ltd, New Delhi Vs. K. T. Morris - AIR 1960 Supreme Court 875 as under:

> "The expression "workmen concerned in such dispute" in S. 33(1)(a) is not limited to the workmen directly or actually concerned in such dispute, but includes all workmen or whose behalf the dispute has been raised as well as those who would be bound by the award which may be made in the said dispute."

Then in the subsequent case of Bhavnagar Municipality Vs. Alibhai Karimbhai and others - 1977 1 L.L.J. 407, it has been observed in para 9 as under:

> " There is a clear prohibition in S.33(1)(a) against altering conditions of service by the employer under the circumstances specified except with the written permission of Tribunal or other authority therein described."

In para 10 of the said judgment, in order to attract Section 33(1)(a), the following features must be present:

(1) There is a proceeding in respect of an industrial dispute pending before the Tribunal.

(2) Conditions of service of the workmen applicable immediately before the commencement of the Tribunal proceeding are altered.

(3) The alteration of the conditions of service is in regard to a matter connected with the pending industrial dispute.

(4) The workmen whose conditions of service are altered are concerned in the pending industrial dispute.

(5) The alteration of the conditions of service is to the prejudice of the workmen.

12. I have quoted above two said decision of the Apex Court. But I refrain from recording any conclusion or decision as to whether the respondents in this petition would be the workmen as contemplated by section 33 of the Industrial Disputes Act, in view of the fact that I am allowing the present petition on the ground that the proceedings under section 33 A is not tenable. In my opinion, in interest of both sides it is not proper to record any finding on the said dispute or issue in this petition in which I am holding that the original proceedings before the Industrial Disputes Act was without jurisdiction. It would not be proper to do so because if any observation or finding is recorded by this court then the same is likely to prejudice to the parties if they happened to go before the Industrial Tribunal in case if there is actual contravention of section 33. I have quoted and cited the two decisions of the Apex Court in view of the fact that petitioner is a public body and the attention of the petitioner should be drawn to those decisions so as to take appropriate and proper decision.

13. Thus, in my opinion, the Labour Court before giving relief to an employee under section 33 A has to find out first that there has been a contravention of provisions of section 33. The contravention of provisions of section 33 is the foundation for the exercise of the jurisdiction under section 33 A. The only condition precedent presented by section 33 A is that the Employer/Industry must have contravened the provisions of section 33 during the pendency of the proceedings before the Industrial Tribunal/Labour Court. In the absence of the contravention, the Industrial Tribunal/Labour Court does not have jurisdiction for taking action under section 33 A. If the Employer/Industry happened to contravene of provisions of section 33 then the provision of section 33 A empowers the Industrial Tribunal/Labour Court to give the appropriate relief as required by the facts of the case.

14. Thus, I hold that the original proceedings initiated by the respondents under section 33 A before the Industrial Tribunal is not tenable in law. The said proceeding is without jurisdiction. Consequently, the order of interim relief granted in favour of the respondents by the Industrial Tribunal is null and void. When the original proceedings is without jurisdiction, even the action of ad-interim relief also will be without jurisdiction, therefore, in these circumstances, the present Writ petition deserves to be allowed and the order of interim relief as well as the whole proceedings

before the Industrial Tribunal will have to be quashed and set aside. I, therefore, allow this writ petition and I hereby ordered that the Complaint No.1/1998 in Reference No.137/1994 is quashed and set aside. The Rule is made absolute in the above terms. In the circumstances of the case, parties are directed to bear their respective costs.

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